No. 87-367

In The

Supreme Court of the United States

October Term, 1987

BENDIX AUTOLITE CORPORATION,

Appellant,

v.

MIDWESCO ENTERPRISES, INC.,

Appellee.

INTERNATIONAL BOILER WORKS COMPANY,

Third Party Defendant.

APPEAL FROM THE UNTED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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Jurisdictional Statement Filed September 1, 1987
Probable Jurisdiction Noted November 2, 1987

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RELEVANT DOCKET ENTRIES

DATE	N.R.	PROCEEDINGS
12-19-80	1	COMPLAINT with Jury Demand, fld.
12-19-80		SUMMONS issued.
1- 8-81		SUMMONS returned SERVED 12-30-80 on Midwesco Enterprises, Inc., filed. Marshal fees $3.00.
1-15-81		STIP. and ORDERED that deft. has to Feb. 20, 1981 to respond, filed. DJY Notice waived.
1-19-81		APPEARANCE of Philip L. Dombey as counsel for pltf., filed. Copies mailed 1-15-81.
1-19-81		MOTION of Dombey, Atty. for leave to participate in a particular Case, filed. Attached affidavit. Copies mailed 1-15-81.
2- 6-81		APPROVED MOTION of Attorney Dombey granting permission for Gerald K. Flagg to participate as co-counsel for plaintiff, filed. DJY. Copies mailed to Dombey, Flagg, and Bamman.
2-20-81	2	ANSWER of deft. Midwesco to complaint, filed. Copies mailed (2-23-81)
2-27-81	3	3rd party complaint against *International Boiler Works Co.*, filed. Copies mailed. (2-27-81)
2-27-81	4	3rd party complaint against *Stoker Corp.; Joseph F. Stenglein; Robert L. Dubs* and *Unknown Stockholders and Officers of Stoker Corp.*, filed. Copies mailed. (2-27-81)
2-27-81		3rd party Summons issued to U.S. Marshal Office. (2-27-81)
2-27-81	5	INTERROGATORIES of 3rd party pltf. to deft. Thomas E. Barnes, filed. Copies mailed. (2-27-81)

DATE	N.R.	PROCEEDINGS
2-27-81	6	INTERROGATORIES of 3rd party pltf. to deft. Joseph E. Stenglein, filed. Copies mailed. (2-27-81)
2-27-81	7	INTERROGATORIES of 3rd party pltf. to deft. Robert L. Dubs, filed. Copies mailed. (2-27-81)
3- 6-81		2 SUMMONS returned and filed. 3rd Party Complaint SERVED: 3-3-81 on Joseph F. Stenglein and 3-4-81 on Robert L. Dubs.
3- 9-81	3	Summons returned and filed. 3rd Party Complaint SERVED: 3-4-81 on The International Boiler Works Company and 3-5-81 on Stoker Corporation C/O Statutory Agent Glenn T. Dubs, and Unknown Stockholders and Officers of Stoker Corp. c/o Glenn Dubs Statutory Agent.
3-16-81	8	NOTICE of pltf. of taking records depo. and Request for Production of Documents under FR 34, filed. Copies mailed 3-13-81.
3-16-81	9	1st set of interrogatories of pltfs. to deft., filed. Copies mailed 3-13-81.
3-20-81		MOTION of 3rd party defts. for enlargement of time (to April 20, 1981) to respond to complaint and interrogatories, filed. Copies mailed 3-18-81.
4- 6-81		ORDERED that 3rd party defts. have thru April 20, 1981 to file response to 3rd party complaint and to Interrogatories, filed. DJY Copies mailed 4-7-81.
4-17-81		STIP. & ORDER granting deft. Midwesco to May 18, 1981 to file its answers to interrogatories, fld. DJY. Notice waived.
4-22-81	10	ANSWER of 3rd Party Defts, to Complaint of Third Party Pltf., filed. Copies mailed 4-20-81.

DATE	N.R.	PROCEEDINGS
5- 6-81	11	MOTION of deft. and 3rd Party Pltf., Midwesco, *for default judgment* against 3rd Party Deft., International Boiler Works Company, filed. Copies mailed. Denied 8-1-82.
5-11-81		DEFAULT NOTED BY CLERK against 3rd party deft. International Boiler Works Company, filed. Copies mailed to all counsel of record. (On Motion)
5-18-81	12	ANSWERS of deft. Barnes to interrogatories of deft. Midwesco, filed.
5-18-81	13	ANSWERS of deft. Stenglein to interrogatories of deft. Midwesco, filed.
5-18-81	14	ANSWERS of deft. Dubs to interrogatories of deft. Midwesco, filed.
5-29-81		Stip. and ordered that deft. Midwesco has to June 20, 1981 to respond to interrogatories, filed. DJY Copies mailed to Domby and Bamman. (5-29-81)
5-29-81		JUDGMENT ENTRY that co-counsel for deft. is authorized to withdraw as counsel, filed. DJY Copies mailed 6-1-81.
6- 1-81		MOTION of H. William Bamman, attorney for deft. Midwesco, for leave to participate, filed. Mld.
6-18-81		Approved motion of deft. Midwesco for leave to participate, filed. DJY Copies mailed 6-22-81. Barnet and Beigel may appear as co-counsel on behalf of deft. Midwesco.
7-20-81	15	MOTION of pltf. to compel discovery, filed, with Affidavit in support of reasonable attorney fees, filed. Copies mld. 7/17/81. Denied.
7-29-81		MOTION of deft. to strike, filed. Copies mailed. Granted.

DATE	N.R.	PROCEEDINGS
8-11-81	16	OPPOSITION of pltf. to deft's motion to strike, filed. Copies mld. 8/10/81.
8-10-81	17	ANSWERS of deft. to Interrogatories, filed. Copies mailed 8/10/81.
8-26-81	18	RESPONSE of deft. to pltf's Request for Production of Documents, filed. Copies mailed 8-24-81.
9-17-81	19	MOTION (2nd) of pltf. for order compelling discovery, filed. Copies mailed.
9-25-81		MOTION of deft. Midwesco for extension of time to October 21, 1981 to respond to Motion to Compel, filed. Copies mailed.
10-13-81		Ordered that deft. Midwesco has to Oct. 21, 1981 to file its response to pltfs. 2nd motion for Order Compelling Discovery, filed. DJY Copies mailed. (10-13-81)
10-21-81	20	INTERROGATORIES (1st) of deft. to pltf., filed.
10-21-81	21	RESPONSE of deft. Midwesco to pltfs. 2nd motion for order compelling discovery, filed. Copies mailed 10-21-81.
10-29-81	22	MOTION of pltf. for ext. of time to answer, object, or otherwise respond to deft's Interrogatories, filed. Copies mailed 10-28-81.
11-16-81	23	RESPONSE of deft. to pltf's. motion for an order expanding the period in which to answer, object, or otherwise respond to deft's. interrogatories, filed. Copies mailed 11-12-81.
12- 7-81	24	MOTION of 3rd party pltf. Midwesco for default judgment against 3rd party deft. International Boiler Works, filed. Copies mailed 12-4-81.

DATE	N.R.	PROCEEDINGS
1- 5-82	25	MEMO. of 3rd party deft. Intl. Boilerworks Co. in opposition to motion of 3rd party pltf. Midwesco for default judgment, fld. Mld.
1-26-82	26	ANSWER of the International Boiler Works Company to Third Party Complaint Lodged. Copies mailed 1-26-82.
6-21-82	27	REQUEST of deft. and 3rd party pltf. for production of documents from International Boiler Works Company, filed. Copies mld. 6/18/82.
6-21-82	28	REQUEST of deft. and 3rd party pltf. for production of documents from Canton Stoker Corporation, filed. Copies mld. 6/18/82.
8-30-82		MOTION for leave to file amended 3rd party complaint filed. Mld.
9- 1-82	29	MEMO. & ORDER filed. JWP. Pltf's. motions to compel denied. Deft's. motion to strike is granted. Motion of 3rd party pltf. for default judgment against 3rd party deft. International Boiler Works Co. denied. Copies 77(d) to: Domby, Flagg, Bamman, Simiele, and Britz. (9/1/82)
9-16-82		ORDER (endorsed on motion) granting 3rd-pty. pltf. leave to file amended 3rd-pty complaint filed. JGC for JWP. Copies 77(d) to: Domby, Flagg, Bamman, Simiele and Britz. (9/16/82)
9-16-82	30	AMENDED THIRD PARTY COMPLAINT filed. Mld. (not served by summons on new 3rd-pty defts).
9-24-82		NOTICE, Pretrial 10-6-82 at 11:00 A.M. Mailed to Dombey, Flagg & Bamman.

DATE	N.R.	PROCEEDINGS
10- 6-82	31	Deft. Midwesco SUPPLEMENTAL ANSWERS to interrogatories filed. Mld.
10-15-82		NOTICE, pretrial 10/21/82 at 11:30 a.m. mld. to: Dombey, Flagg and Banman.
10-20-82		MOTION of deft. Midwesco for continuance of pretrial filed. Mld.
10-22-82	32	PLTF'S ANSWERS to interrogatories filed. Mld.
10-22-82		ORDER granting deft. Midwesco's continuance of pretrial 10/21/82 filed. Pretrial reset for 11/8/82 at 2:30 p.m. JWP. Copies mld. (10/25/82)
10-22-82		MOTION & ORDER granting pltf's continuance of pretrial 10/21/82 filed. JWP. Copies mld. (10/25/82)
11- 3-82		SUMMONS issued on amended 3rd-pty. complaint.
11- 8-82		MOTION for continuance by pltf. filed. Mld.
11- 8-82	33	ORDER (endorsed on motion) denying pltf's motion for continuance of pretrial 11/8/82 filed. JWP. Copies mld. (11/8/82)
11- 8-82	34	MOTION of deft. Midwesco for summary judgment filed. Mld.
11-15-82		10 SUMMONS ret. & filed. 1 served 11/4; 6 served 11/5; 2 served 11/6 and 1 served 11/8.
11-16-82		PRETRIAL ORDER filed. JWP. Discovery to close 3/11/83. Pretrial 5/9/83 at 2:30 p.m. Jury trial (back-up) 6/21/83. Mag. impanel jury 6/20/83 at 9:00 a.m. Trial time 4 days. Parties granted to 4/11/83 to file pretrial pleadings and evid. motions. Parties to inform the re: jury and proceeding before the Mag. Pretrial motions to be filed by 3/11/83. Copies mld. (11/16/82)

DATE	N.R.	PROCEEDINGS
12- 1-82	35	*ANSWER of 3rd-pty. defts.* filed. Mld.
12-10-82	36	MEMO of deft. Midwesco in support of motion for summary judgment filed. Mld.
12-16-82		MOTION of pltf. for ext. of time to respond to deft. Midwesco's motion for summary judgment filed. Mld.
12-21-82		ORDER granting pltf. to 1/20/83 to respond to deft. Midwesco's motion for summary judgment filed. JWP. Copies mld.
1-21-83		MOTION of pltf. for ext. of time to respond to deft. Midwesco's motion for summary judgment filed. Mld.
1-26-83		ORDER granting pltf. to 1/31/83 to respond to Midwesco's motion for sum. judg. filed. JWP. Copies mld. (1/26/83)
2- 2-83	37	OPPOSITION of pltf. to deft. Midwesco's motion for summary judgment filed. Mld.
2-16-83		STIP. & ORDER ext. time to 3/1/83 for deft. to reply to opposition to motion of Midwesco for sum. judgment filed. JWP. Copies mld. (2/16/83)
2-24-83		NOTICE to take deposition, behalf of pltf. filed. Mld.
3- 3-83		STIP. & ORDER ext. time to 5/5/83 for parties to complete discovery and pursue settlement filed. JWP. Copies mld. (3/3/83)

DATE	N.R.	PROCEEDINGS
3- 3-83	38	REPLY of deft. Midwesco to opposition to motion for sum. judg. filed. Mld.
3-18-83	39	OPPOSITION (supp.) of pltf. to deft. Midwesco's motion for summary judgment filed. Mld.
3-28-83		NOTICE to take deposition, behalf of deft. Midwesco filed. Mld.
3-28-83		NOTICE to take deposition, behalf of deft. Midwesco filed. Mld.
3-28-83		NOTICE to take deposition, behalf of deft. Midwesco filed. Mld.
4- 7-83		NOTICE VACATING & RESETTING pretrial for 5/23/83 at 3:30 p. m. mld. to all counsel.
4-20-83		NOTICE of deposition, behalf of pltf. filed. Mld.
4-27-83	40	MEMO. & ORDER filed. JWP. Deft. Midwesco's motion for sum. judg. denied in part and held in abeyance in part until after 5/20/83. Parties granted 10 days to seek leave to participate in 5/20/83 hrg. in Case C 82-512. Copies mld.
5-10-83		PLTF's petition for leave to participate in hearing of C 82-512 on 5/20/83 at 2:00 p.m. filed.
5-11-83		MOTION of deft. & 3rd party plft. Midwesco to vacate trial date of 6/20/83 filed. Mld.
5-12-83		ORDER (endorsed on motion) granting pltf. leave to participate. Filed.
5-20-83		MIN. of PRO. filed. JWP. Oral argument on motion for sum. judg. begun & concluded. Pltf. granted to 5/27/83 to file

DATE	N.R.	PROCEEDINGS
		supp. brief. Deft. granted to 6/7/83 to respond.
5-31-83		PRETRIAL ORDER filed. JWP. Discovery to close 7/18/83. Jury trial 4/24/84 (certain) 8/1/83 (back-up). Parties to inform the Court re: Mag. Trial date 6/21/83 vacated. Parties granted to 7/18/83 to file pretrial pleadings and evid. motions. Jury notice attached. Copies mld.
7-13-83		MOTION of pltf. to vacate trial date of 8/1/83 and vacate discovery date of 7/18/83 filed. Mld.
7-18-83		ORDER (endorsed on motion) vacating trial date of 8/1/83 and discovery date 7/18/83 filed. JWP. Copies mailed. (See P/T Order of 5/31/83)
7-20-83	*	MOTION of defts. Stoker Corp. and Joseph Stenglein to vacate 8/1/83 trial date and vacate discovery completion date of 7/18/83 filed. Mld.
		*Note 7/18/83 Order.
7-25-83		MEMO & ORDER filed. JWP. Third party defts' motion to vacate trial date & discovery date DENIED AS MOOT. Copies mailed.
8- 8-83	41	DEPOSITION of Krishnagiri Iyengar filed.
8- 8-83	42	DEPOSITION of Kenneth R. Harrison filed.
8- 8-83	43	DEPOSITION of Clinton C. Boushell filed.
9-30-83	44	DEPOSITION of Dale Lowery filed.
9-30-83	45	DEPOSITION of Lee Roy Coy filed.

DATE	N.R.	PROCEEDINGS
9-30-83	46	DEPOSITION of Richard Wolery filed.
11-21-83		NOTICE of deft. Joseph Francis Stenglein of appointment of executor filed. Mld.
3- 6-84	47	MEMO & ORDER filed. JWP. Deft. Midwesco's s.j. motion granted/denied in part. Pltf's claims against deft. Midwesco dismissed. Pretrial set for 3/19/84 at 11:30 a.m. Copies mld.
4- 4-84	48	NOTICE OF APPEAL of pltf. filed. Copies by clerk to: Dombey, Steinhart, Bamman, Bornstein, Simiele, Britz on 4/4/84.
4- 4-84		TRANS. FORM with certified copies of: docket entries, Memo & Order of 3/6/84, and notice of appeal mld. to Sixth Circuit.
4-12-84		ACKNOWLEDGED RECEIPT for Sixth Circuit, docketed 4/9/84, #84-3275.
4-12-84		TRANSCRIPT ORDER form of pltf. re: transcript is unnecessary for appeal purposes. Filed. Mld.
4-18-84		TRANS. FORM with *certified record* on appeal, 2 vols. of pleadings, & 6 vols. of depositions mld. to Sixth Circuit.
4-27-84		ACKNOWLEDGED RECEIPT of certified record on appeal filed 4/24/84.
8- 8-84	49S	STIP & ORDER granting settlement of case between deft. Midwesco & all 3rd party defts. except Int'l Boiler Works filed. JWP. Copies mld.
8- 8-84		TRANS. FORM with certified copy of docket sheet and 1 supplemental pleading (49s) mld. to Sixth Circuit.

DATE	N.R.	PROCEEDINGS
8-21-84		ACKNOWLEDGED RECEIPT of supplemental pleading for Sixth Circuit filed 8/13/84.

I hereby certify that this instrument is a true and correct copy of the original on file in my office.

ATTEST: James S. Gallas, Clerk
U.S. District Court
Northern Dist. of Ohio

By: Vickie L. Lorenzen

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Bendix Autolite Corporation,

Plaintiff Case No. C 80-750

vs.

Midwesco Enterprises, Inc., et al., MEMORANDUM AND ORDER

Defendants (Filed April 27, 1983)

POTTER, J.:

This cause came to be heard on defendant Midwesco Enterprises, Inc.'s (hereinafter Midwesco) motion for summary judgment and plaintiff Bendix Autolite Corporation's (hereinafter Bendix) opposition thereto. Bendix commenced this action against Midwesco on December 19, 1980 based on a contract between Bendix and Midwesco entered into on August 2, 1974. Pursuant to the contract Midwesco was to supply and install a coal-fired boiler system of specified output at a Bendix facility in Fostoria, Ohio. Bendix asserts that Midwesco improperly installed the boiler system, and knowingly installed a boiler system which was too small to produce the quantity of steam specified in the contract. Count I of the plaintiff's complaint seeks damages for breach of contract and Count II sounds in fraud. This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

The statute of limitations in Ohio for an action for breach of a contract for the sale of goods is four years. O.R.C. § 1302.98. The statute of limitations for a fraud action is also four years. O.R.C. § 2305.09(c). The affi-

davit of David Miller, a copy of which is attached as Exhibit A to Midwesco's memorandum, states that Bendix commenced beneficial use of the boiler system on July 3, 1975. Midwesco has moved for summary judgment dismissing the complaint, based on its contention that the action is time-barred under the statute of limitations.

The critical issue raised by Midwesco's motion is the applicability and effect of the Ohio Tolling Statute, O.R.C. § 2305.15, which states:

> When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

Midwesco is an Illinois corporation which during all relevant time periods was not authorized to do business in Ohio and had not appointed an Ohio agent for the service of process. However, Midwesco asserts that since it was continually subject to the long arm jurisdiction of the Ohio courts during the relevant limitations period, the statute of limitations was not tolled and Bendix's action is now time barred. Midwesco further asserts that a contrary interpretation of the Tolling Statute would be in violation of the Commerce and Due Process clauses of the United States Constitution.

Initially, the Court is asked to interpret the decision of the Ohio Supreme Court in *Seeley v. Expert, Inc.*, 26 Ohio St. 2d 61, 269 N.E. 2d 121 (1971). Midwesco asserts that *Seeley* "simply held that the Tolling Statute applies to a non-resident owner or operator of a motor vehicle, regardless of amenability to service of process," and that the decisions of some lower courts of Ohio and Ohio District Courts interpreting *Seeley* as changing the Ohio Supreme Court's prior distinction between individuals and corporations were wrong.

In *Ohio Brass Co. v. Allied Products Corp.*, 339 F. Supp. 417 (N.D. Ohio 1972), Judge Green analyzed *Seeley* as follows:

> In *Seeley* non-resident plaintiffs were involved in an auto accident in Lucas County, Ohio with a truck driven by a non-resident employee of a Michigan corporation. Suit was filed in Ohio against the driver and his employer after the applicable statutes of limitation had run. The Ohio Supreme Court postulated the issue before it thereby:
>
> > The most troublesome question presented by this case is whether such a "savings clause" is or should be applicable to toll a statute of limitations in cases where there is no need for such tolling; in cases where suit may be commenced *at any time* and a judgment *in personam* obtained despite the absence of the defendant from the state of Ohio. 26 Ohio St.2d 61, 65, 269 N.E.2d 121, 125.
>
> The conclusion of the court was that:
>
> Were this a question of first impression in Ohio, the adoption of such a rule might be justified upon the basis that the purposes to be served by tolling the statute of limitations are necessarily so interwoven into the statute—even though not expressed—that the application of the statute is limited to cases where suit

> cannot be instituted because the defendant is not amenable to process.
>
> • • • • •
>
> Any rule establishing the inapplicability of the "savings clause" to situations where a defendant is amenable to process could not logically make any distinction as to the type of process. It logically would have to apply regardless of whether the nonresident was amenable to process under R.C. § 2703.20, under the "long-arm" statutes, R.C. §§ 2307.38.2 and 2307.38.4, or by some other method. It likewise would apply where service of process is not needed to obtain a personal judgment, e.g., cognovit judgments.
>
> • • • • •
>
> Defendants urge this court to reexamine the position taken in *Commonwealth* and *Couts*. They point out that a majority of the states, with comparable "savings clause" statutes, have taken the view that the statute of limitations is not tolled under circumstances of amenability to process. Their position presents a very persuasive argument for change in the existing Ohio law in such respect. We conclude, however, that a change of the law by court "interpretation" at this time would be violative of the basic rules of statutory interpretation. In the second paragraph of the syllabus of Slingluff v. Weaver (1902), 66 Ohio St. 621, 64 N.E. 574, this court held:
>
> > ". . . The intent of the lawmakers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the lawmaking body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has

plainly expressed, and hence no room is left for construction.

The literal language of the Ohio "savings clause" is tied to the tolling of acts which prevent *personal service* in Ohio rather than to acts which would prevent any judgment *in personam*. Even assuming that a legislative intent to the contrary might have been inferred prior to judicial determination by this court rejecting such a position, principles of *stare decisis* and legislative acceptance should preclude the overruling of *Commonwealth* and *Couts* at this time.

* * * * *

In accordance with our holding in Couts v. Rose (152 Ohio St. 45, 40 O.O 482, 90 N.E.2d 139), we conclude that the provisions of R.C. § 2305.15, tolling the running of the Ohio statutes of limitations during the time a defendant is absent from the state of Ohio, are applicable despite the fact that suit could have been brought in Ohio at any time after the automobile accident . . . id., pp. 67, 69-70, 71, 71-72, 73, 269 N.E.2d 126, 127, 128-129.

When called upon to distinguish Tompson v. Horvath, supra, and Title Guaranty & Surety v. McAllister, supra, the court pointed out that each involved a corporation which had originally been subject to service of process in Ohio. However, the court further quoted the language from the *Horvath* decision which found a difference between corporate and individual defendants. The incorporation of that delineation is quite mystifying, in that the Ohio Supreme Court had before it both a corporate and an individual defendant, and applied the same rule to each.

The only reasonable conclusion to be drawn from the decisions of the Ohio Supreme Court, at least to date, is that a foreign corporation upon which personal service in Ohio could not be had is absent from the state within the meaning of O.R.C. § 2305.15, and that the statute of limitations does not run against such corporation until such time as it is subject to personal service in Ohio, regardless of the fact that an Ohio court could have acquired *in personam* jurisdiction over such corporation by virtue of substituted service.

This same interpretation was followed in *Durham v. Anka Research Limited*, 61 Ohio App. 2d 239, 396 N.E.2d 799 (1978); *Scheer v. Air-Shields, Inc.*, 61 Ohio App. 2d 205, 401 N.E.2d 478 (1978); *Bruck v. Eli Lilly & Co.*, 523 F. Supp. 480 (S.D. Ohio 1981); and *Mead Corporation v. Allendale Mut. Ins. Co.*, 465 F. Supp. 355 (1979).

Therefore, this Court concludes that under Ohio law, the application of the Savings Clause, O.R.C. § 2305.15, to toll the statute of limitations depends on whether personal service may be made on defendants within the state. *Seeley v. Expert, Inc.*, 26 Ohio St.2d at 72. If the defendant is not amenable to personal service within the State of Ohio, it is deemed to be "out of state," even though substitute service may be made on the defendant by means of Ohio's long-arm statutes. *Id.* at 69. A defendant who is "out of state" is not protected by Ohio statutes of limitation, as the statute does not begin to run against that defendant as long as it is out of the state. Conversely, if a defendant is not out of the state, the statute of limitations runs its natural course and is not tolled by the Savings Clause.

It is clear that Midwesco was neither registered to do business in Ohio nor represented in Ohio for purposes of

service of process during the relevant time period. Exhibit A attached to Midwesco's memorandum. Therefore, Midwesco was "out of state" during this time and the statute of limitation was tolled pursuant to O.R.C. § 2305.15.

Midwesco next argues that the Ohio Tolling Statute imposes an impermissible burden on interstate commerce and violates the due process clause of the Fourteenth Amendment.

This Court is to hear argument on this same issue in the case of *Copley v. Heil-Quaker*, No. C 82-512, on May 20, 1983, at 2:00 P.M. The parties in the present action may seek leave of court, within ten days of this order, to participate in that hearing.

THEREFORE, for the above stated good cause appearing, it is

ORDERED that Midwesco's motion for summary judgment as to the effect of O.R.C. § 2305.15 should be, and hereby is, DENIED, and it is

FURTHER ORDERED that Midwesco's motion for summary judgment as to the constitutionality of the Ohio Tolling Statute should be, and hereby is, held in abeyance until argument is heard on this issue in the case of *Copley v. Heil-Quaker*, No. C 82-512, on May 20, 1983 at 2:00 P.M.; and it is

FURTHER ORDERED that the parties in this action may seek leave of court, within ten days of this order, to participate in the May 20, 1983 hearing.

/s/ John W. Potter
United States District Judge

In conformity with Rule 77(d) F.R.C.P. please take notice that the following order of judgment was entered in this Court on: April 27, 1983
James S. Gallas, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Bendix Autolite Corporation,

Plaintiff Case No. C 80-750

vs.

Midwesco Enterprises, Inc., et al., MEMORANDUM AND ORDER

Defendants (Filed March 8, 1984)

POTTER, J.:

This matter is before the Court on defendant Midwesco Enterprises, Inc.'s (hereinafter Midwesco) motion for summary judgment and plaintiff Bendix Autolite Corporation's (hereinafter Bendix) opposition thereto, defendants' reply and plaintiff's supplemental response. Bendix commenced this action against Midwesco on December 19, 1980 based on a contract between Bendix and Midwesco entered into on August 2, 1974. Pursuant to the contract Midwesco was to supply and install a coal-fired boiler system of specified output at a Bendix facility in Fostoria, Ohio. Bendix asserts that Midwesco improperly installed the boiler system, and knowingly installed a boiler system which was too small to produce the quantity of steam specified in the contract. Count I of the plaintiff's complaint seeks damages for breach of contract and Count II sounds in fraud. This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

This Court in a memorandum and order filed April 27, 1983 denied that portion of defendant Midwesco's motion for summary judgment which argued that plaintiff's action was time barred under the statute of limitations. This Court reserved the issue of whether the Ohio Tolling Statute, O.R.C. § 2305.15, imposed an impermissible burden on interstate commerce and whether O.R.C. § 2305.15 violated the due process clause of the Fourteenth Amendment. Because this Court was to hear oral argument on these same issues in the case of Copley v. Heil-Quaker, No. C 82-512, the Court permitted the parties to participate in that hearing. The issues herein are presented on the pleadings, memoranda, affidavits and oral arguments.

Defendant Midwesco has argued that the provisions of O.R.C. § 2305.15 violate the Commerce Clause under either a *per se* or a balancing test. Defendant Midwesco also has argued that O.R.C. § 2305.15 violates the due process clause of the Fourteenth Amendment because a state cannot regulate foreign corporations doing business within the state's borders by imposing conditions on the corporation which require relinquishment of constitutional rights.

The Court will first consider defendant Midwesco's arguments regarding the Commerce Clause. The Supreme Court has applied two tests in analyzing whether a state statute violates the Commerce Clause. The Supreme Court has held that certain state statutes impose burdens on interstate commerce which are so substantial, direct and unjustified that the Supreme Court has held that the state statute is *per se* violative of the Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Allenberg Cotton Company v. Pittman*, 419 U.S. 20 (1974); *Pike v.*

Brice Church, Inc., 397 U.S. 137, 142 (1970). The second test is a balancing test. If a state statute regulates even handedly and imposes only incidental burdens on interstate commerce, the state statute may still be found to violate the Commerce Clause if the burden imposed on interstate commerce is clearly excessive when balanced against the benefit to the state of the statute. *Pike v. Brice Church, Inc., supra*, at 142. In applying the balancing test, the nature of the local interest and whether this interest can be promoted as well with a lesser impact on interstate commerce should be considered. *Pike v. Brice Church, Inc., supra*, at 142.

Two courts have recently considered statutes of other states which contained similar provisions as O.R.C. § 2305.15 and have found these provisions violated the Commerce Clause. In *Coons v. American Honda Motor Company, Inc.*, 94 N.J. 307, 463 A2d 921 (1983), the New Jersey Supreme Court held that New Jersey's tolling statute, *N.J.S.A.* 2A:14-22, was unconstitutional.

The issue in *Coons* arose when the United States Supreme Court, after initially agreeing to hear the appeal of one of the parties, remanded the case to the New Jersey court because of its decision in *G. D. Searle Co. v. Cohn*, 455 U.S. 404 (1982). In *Searle* the Supreme Court held that tolling provisions such as those contained in *N.J.S.A.* 2A:14-22 or O.R.C. § 2305.15 do not violate the Equal Protection Clause. However, because of ambiguities in state law, the Supreme Court remanded the issue to state court for consideration of the issue of whether such provisions violate the Commerce Clause.

The New Jersey Supreme Court first held that neither the statutes nor the Court rules permit a corporation to appoint a representative to receive service of process without registering to do business in the state, and that any attempt to so file with the Secretary of State must be without effect. The Court then held that since the tolling statute mandates licensing in New Jersey in order to get its benefits the statute violates the Commerce Clause. In reaching this conclusion, the court relied on a series of Supreme Court decisions which have found a per se violation of the Commerce Clause where a state has discriminated against a foreign corporation engaged in interstate commerce merely because it has failed to do business in that state.

In a footnote the court in *Coons* indicates that even if it applied a balancing test, it would still find that the provisions of *N.J.S.A.* 2A:14-22 violate the Commerce Clause. According to the court, the burdens attached to the requirement of obtaining certification to register to do business to avoid the tolling of the statute of limitations outweigh the benefits arising from the tolling provision.

The other court which has recently ruled upon this issue is the United States District Court for the District of Idaho in *Richard Dean McKinley v. Combustion Engineering, Inc., et al.*, Civil No. 80-4045, filed November 15, 1983. In *McKinley* the court had dismissed the plaintiff's wrongful death claims on the grounds they were barred by the statute of limitations. The dismissal was appealed to the Ninth Circuit. The Ninth Circuit, because of the Supreme Court's decision in *G. D. Searle & Co. v. Cohn, supra*, remanded the case to the district court for a de-

cision on whether a former provision of Idaho Code 30-509 violated the Commerce Clause. The provisions of Idaho Code 30-509 were as follows:

> *Statute of limitations.*—Every such corporation which fails to comply with the provisions of this chapter shall be denied the benefit of the statutes of the state limiting the time for the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporations during such time as such person duly designated, as aforesaid, upon whom such service can be made, shall be within the state.

Subsequent to the filing of the lawsuit, this statute was repealed.

The court in *McKinley* first discussed the court's decision in *Coons*. The court in *McKinley* then examined Idaho law in order to determine the burden which the Idaho tolling statute placed upon foreign corporations. The court found that the tolling statute forced foreign corporations in Idaho to choose between either exposing itself to personal jurisdiction in the Idaho courts by complying with the tolling statute or being liable in perpetuity for all lawsuits filed against it under Idaho state law. The court in *McKinley* agreed with the court in *Coons* that if a *per se* rule was employed the burden imposed by the tolling statutes on foreign corporations would violate the Commerce Clause. According to the court in *McKinley*, however, a *per se* rule was inapplicable because under existing Idaho case law the tolling statute could not be found to apply to firms engaged exclusively in interstate commerce.

The court in *McKinley* therefore utilized a balancing test and analyzed whether the burdens on interstate commerce imposed by the Idaho tolling statute outweigh the benefits of the statute. The court rejected the argument that no real burden was imposed upon a foreign corporation by forcing it to register in order to avoid forever being liable on state causes of action because a foreign corporation was already subject to personal jurisdiction under the Idaho long arm statute. According to the court in *McKinley*, the law on minimum contacts is not crystal clear. The standards which the courts have utilized in determining whether personal jurisdiction exists raise questions regarding "what constitutes substantial activities," "when will a single act be sufficient" and "what is reasonable." Therefore, foreign corporations doing business in Idaho may have an arguable defense based upon lack of personal jurisdiction. The provisions of Idaho Code 30-509 require a corporation to waive this defense and therefore impose a real burden upon foreign corporations which seek to avoid perpetual liability in Idaho.

The court in *McKinley* found that the benefit of requiring foreign corporations to appoint in-state representatives for service of process purposes is to make it easier for Idaho residents to effect service on a foreign corporation, resulting in a time and cost savings. According to the court in *McKinley*, this benefit, however, is outweighed by the burden of waiving a legal defense. A successful motion to dismiss for lack of personal jurisdiction can end possibly protracted litigation.

In addition, the court found that the benefits of the Idaho tolling statute could have been obtained through less

onerous means. Corporations could have been required to file with the Secretary of State the location and address of its representative for service of process purposes.

The *McKinley* court therefore found:

> . . . that a statutory scheme that in essence requires foreign corporations to waive a legal defense places a serious burden on interstate commerce. These statutes do provide benefits to Idaho residents, but the same benefits could be realized through less onerous means. But even if less onerous means were not available, the Court would still find, for the reasons previously discussed, that the burdens placed on interstate commerce by the Idaho tolling statutes are clearly excessive when compared to the benefits obtained by those statutes.
>
> For all of the above reasons, the Court finds that Idaho Code 30-509 was unconstitutional under the Commerce Clause during the time that it was in effect prior to its repeal in 1979.

Richard Dean McKinley v. Combustion Engineering, Inc., ***supra*** **at 13-14.**

This Court agrees with the analysis of the *Coons* court and the court in *McKinley*. Regardless of whether the provisions of O.R.C. § 2305.15 are analyzed under a *per se* test or a balancing test, this provision, as applied to defendant Midwesco, violates the Commerce Clause. Under the *per se* test this provision violates the Commerce Clause by forcing interstate corporations to obtain a license in order to obtain the benefit of the statute of limitations defense. Under the balancing test, the burden of having to obtain a license and therefore waiving a possible defense of lack of personal jurisdiction outweighs the benefits to potential litigants of making service of process

easier to obtain on corporations engaged solely in interstate commerce. The Court therefore finds that the provisions of O.R.C. § 2305.15 are unconstitutional, as applied to defendant Midwesco, because they violate the Commerce Clause.

Having found that the provisions of O.R.C. § 2305.15 violate the Commerce Clause, the Court does not reach defendant Midwesco's due process arguments.

Finally, plaintiff has argued that defendant Midwesco should be estopped from asserting a statute of limitations defense because defendant Midwesco promised over a four year period to repair defects in the boiler system and failed to do so. Plaintiff alleges that it reasonably relied upon defendant Midwesco's representations in forebearing to institute this lawsuit. Plaintiff also argues that under Ohio law the statute of limitations on fraud does not begin to run until the fraud is discovered. According to plaintiff, it first learned of defendant Midwesco's fraud in knowingly installing a boiler system which did not meet specifications on August 24, 1979. Therefore, plaintiff argues that its action filed December 19, 1980 was filed well within the four year statute of limitations for fraud.

As defendant points out, plaintiff has failed to support these arguments with any affidavits which establish that genuine issues of material fact exist on either the issue of estoppel or fraud. Therefore, the Court finds that no genuine issue on either of these arguments exist for trial. See Fed.R.Civ.P. 56(e).

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendant Midwesco's motion for summary judgment be, and hereby is, DENIED in part and GRANTED in part; and it is

FURTHER ORDERED that plaintiff's claims against defendant Midwesco be, and hereby are, dismissed; and it is

FURTHER ORDERED that this cause be, and hereby is, set for pretrial on defendant Midwesco's third party claims on March 19, 1984 at 11:30 A.M.

/s/ John W. Potter
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

William Copley, et al.,	)	
	)	
Plaintiffs,	)	CASE NO. C82-512
	)	
vs.	)	
	)	Judge John W. Potter
Heil-Quaker Corporation, et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT

COUNTY OF ERIE)
) ss:
STATE OF OHIO)

I, James T. Murray, being first duly sworn, depose and state as follows:

1. I am the attorney of record for William Copley, Patsy Copley and Dale Copley, the plaintiffs in the above-captioned proceeding, and I make this affidavit as part of plaintiffs' response to Heil-Quaker's supplemental reply in support of Heil-Quaker's motion asking the Court to dismiss the complaint.

2. Subsequent to Mr. Stanley Lipnick's affidavit with a letter attached from Patricia Mell, Corporations Counsel for the Ohio Secretary of State's office, I caused inquiry to be made to the same person. Those inquiries directed to Patricia Mell revealed to affiant that the precise issue before the Court had not been presented to Patricia Mell, all as more fully set forth in Exhibit A attached hereto and by reference incorporated herein.

3. When the precise issue before this Court was presented to corporations counsel for the Secretary of State's office, it was made clear that a foreign corporation, if in fact it was shown to be strictly interstate in nature, could designate a statutory agent without being required to obtain a license to do business in the State of Ohio.

4. Affiant's inquiries prompted the December 22, 1983 letter from Patricia Mell in which she emphatically qualifies her September 14, 1983 letter directed to Mr. Stanley Lipnick.

Further affiant sayeth not.

/s/ James T. Murray
James T. Murray
MURRAY & MURRAY CO., L.P.A.
300 Central Avenue
Sandusky, Ohio 44870
Telephone: (419) 627-9700
Attorney for Plaintiffs

Sworn to before me and subscribed in my presence this 29th day of December, 1983.

/s/ Lori L.E. Richard
Notary Public

LORI L.E. RICHARD
Notary Public State of Ohio
My Commission Expires
Nov. 19, 1985

I hereby certify that this instrument is a true and correct copy of the original on file in my office

ATTEST: James S. Gallas, Clerk
U.S. District Court
Northern Dist. of Ohio

By: Vicki L. Lorenzen
Deputy Clerk

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

William Copley, et al.,

Plaintiffs,

vs.

Heil-Quaker Corp., et al.,

Defendants.

Case No. C 82-512

MEMORANDUM
AND ORDER
(Filed March 8, 1984)

POTTER, J.:

This matter is before the Court on defendant Heil-Quaker Corporation's (hereinafter "Heil-Quaker") motion to dismiss and plaintiffs' opposition thereto, defendant Heil-Quaker's reply, plaintiffs' response, opposition of Bendix *amicus curiae* to defendant's motion to dismiss, reply by defendant Heil-Quaker, further opposition by Bendix, supplemental response of plaintiffs and defendant Heil-Quaker's supplemental response.

Subsequent to the filing of these motions, the Court has become aware of another case on its docket, William Copley, et al., v. Honeywell, Inc., et al., C 83-682. This case was transferred to this Court from the District of Minnesota, Fourth Division, pursuant to the provisions of 28 U.S.C. § 1404(a). Plaintiffs have filed substantially the same claims with that Court as they filed in the case sub judice. Therefore, the Court will order that Case Nos. C 83-682 and C 82-512 be consolidated.

A hearing was held on defendant Heil-Quaker's motion for summary judgment on May 20, 1983. The issues were presented on the pleadings, memoranda, affidavits and oral arguments.

This action arises out of a gas explosion that occurred on December 12, 1975. Plaintiffs William Copley and Patsy Copley are husband and wife, and are the parents of plaintiff Dale Copley who was born on December 2, 1958. All three plaintiffs are residents and citizens of the State of Ohio.

The complaint herein was filed on August 24, 1982. As amended, it alleges that in 1967 plaintiffs William and Patsy Copley purchased a furnace manufactured by Heil-Quaker and installed it in their home. It further alleges that an December 12, 1975, serious injuries were inflicted upon the plaintiffs by a gas explosion allegedly caused by a malfunction of the furnace. The plaintiffs allege that Heil-Quaker manufactured the furnace and negligently incorporated a defective and malfunctioning control or valve which directly and proximately resulted in the injuries and damages sustained by the plaintiffs. The allegedly defective gas control or valve was manufactured by Honeywell, incorporated into the furnace manufactured by Heil-Quaker and sold to the plaintiffs by Sears.

Heil-Quaker is a Delaware corporation having its principal place of business in Tennessee and manufactures furnaces, central air conditioning equipment, heat pumps, and parts thereof. Its manufacturing operations are conducted only in the State of Tennessee, and the products it manufactures there are shipped for resale to purchasers located in every state of the United States, including Ohio.

Heil-Quaker is licensed to do business and has appointed agents for service of process upon it only in Delaware and Tennessee.

No place of business, officer, managing agent or general agent of Heil-Quaker is located in the State of Ohio. From time to time, sales representatives of Heil-Quaker call on customers in Ohio to promote the sale of the company's products, sometimes taking orders subject to acceptance at the company's office in Tennessee. A service representative of Heil-Quaker also calls on customers in Ohio from time to time. Affidavit of Charles L. Shattuck.

Relief against Heil-Quaker is sought by the first, second, third and fourth causes of action which seek to recover for personal injuries to William and Dale Copley, their lost past and future earnings and medical expenses, Patsy Copley's loss of the concortium of her husband, and William and Patsy Copley's loss of services of Dale Copley.

All of the claims against Heil-Quaker seek recovery for bodily injury and its consequences and are, therefore, subject to O.R.C. § 2305.10 which provides in pertinent part:

> An action for bodily injury . . . shall be brought within two years after the causes thereof arose.

The explosion which caused the bodily injuries occurred on December 12, 1975, and plaintiffs William and Patsy Copley therefore had two years to assert their claims against Heil-Quaker, until December 12, 1977. Since Dale Copley was born on December 2, 1958, he was seventeen years old and a minor on the date of the explosion. O.R.C. § 2305.16 provides that, as to him, the two-year period of

limitations would commence to run when his minority terminated. Thus his time to assert him claim against Heil-Quaker was two years from his eighteenth birthday. O.R.C. § 3109.01. He became eighteen on December 2, 1976 and thus had until December 2, 1978 to assert his claims against Heil-Quaker.

Clearly, the plaintiffs' claims against Heil-Quaker were too late when this action was filed on August 24, 1982 and would be barred without the effect of the Ohio savings clause, O.R.C. § 2305.15. That section provides in pertinent part:

> When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, . . . does not begin to run until he comes into the state or while he is so absconded or concealed . . . .

This provision has been construed to toll limitations when the defendant, including a corporate defendant, is not amenable to personal service of process within the borders of the State of Ohio, even though continuously amenable to "long arm" service outside the state. *Seeley v. Expert, Inc.*, 26 Ohio St.2d 61, 269 N.E.2d 121 (1971); *Ohio Brass Company v. Allied Products Corporation*, 339 F. Supp. 417 (N.D. Ohio 1972). Heil-Quaker argues that § 2305.15, as construed in Ohio and as applied to a corporation in the position of Heil-Quaker violates the Due Process Clause of the Fourteenth Amendment and the Commerce Clause.[1]

Heil-Quaker asserts that § 2305.15 violates the Due Process Clause because it conditions the benefit of the limitation period upon the appointment of an Ohio agent. Heil-

Quaker asserts that the only way a foreign corporation can appoint an agent for service of process is to register to be business pursuant to O.R.C. § 1703.04. Such registration to do business and appointment of an agent would subject it to suit in Ohio when there otherwise would not be the minimum contract required for suit in Ohio. Under the Due Process Clause and the "minimum contracts" rule of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), Heil-Quaker further argues that § 2305.15 violates the Due Process requirement of notice and fair warning because the contradictory nature of the Ohio laws, specifically § 1703.02 and § 2305.15, constitute a trap for unwary sellers.

Heil-Quaker also asserts that § 2305.15 violates the Commerce Clause prohibition of discrimination against interstate firms solely because of the interstate nature of their business. Finally, Heil-Quaker argues that § 2305.15 violates the Commerce Clause requirement that any burden imposed upon commerce be justified by a countervailing local interest.

The Court will first consider defendant Heil-Quaker's arguments regarding the Commerce Clause. The Supreme Court has applied two tests in analyzing whether a state statute violates the Commerce Clause. The Supreme Court has held that certain state statutes impose burdens on interstate commerce which are so substantial, direct and unjustified that the Supreme Court has held that the state statute is *per se* violative of the Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Allenberg Cotton Company v. Pittman*, 419 U.S. 20 (1974); *Pike v. Brice Church, Inc.*, 397 U.S. 137, 142 (1970). The second test is a balancing test. If a state statute regulates

even handedly and imposes only incidental burdens on interstate commerce, the state statute may still be found to violate the Commerce Clause if the burden imposed on interstate commerce is clearly excessive when balanced against the benefit to the state of the statute. *Pike v. Brice Church, Inc., supra,* at 142. In applying the balancing test, the nature of the local interest and whether this interest can be promoted as well with a lesser impact on interstate commerce should be considered. *Pike v. Brice Church, Inc., supra,* at 142.

Two courts have recently considered statutes of other states which contained similar provisions as O.R.C. § 2305.15 and have found these provisions violated the Commerce Clause. In *Coons v. American Honda Motor Company, Inc.*, 94 N.J. 307, 463 A2d 921 (1983), the New Jersey Supreme Court held that New Jerseys tolling statute, *N.J.S.A.* 2A:14-22, was unconstitutional.

The issue in *Coons* arose when the United States Supreme Court, after initially agreeing to hearing the appeal of one of the parties, remanded the case to the New Jersey court because of its decision in *G. D. Searle Co. v. Cohn*, 455 U.S. 404 (1982). In *Searle* the Supreme Court held that tolling provisions such as those contained in *N.J.S.A.* 2A:14-22 or O.R.C. § 2305.15 do not violate the Equal Protection Clause. However, because of ambiguities in state law, the Supreme Court remanded the issue to state court for consideration of the issue of whether such provisions violate the Commerce Clause.

The New Jersey Supreme Court first held that neither the statutes nor the Court rules permit a corporation to appoint a representative to receive service of process without

registering to do business in the state, and that any attempt to so file with the Secretary of State must be without effect. The Court then held that since the tolling statute mandates licensing in New Jersey in order to get its benefits the statute violates the Commerce Clause. In reaching this conclusion, the court relied on a series of Supreme Court decisions which have found a per se violation of the Commerce Clause where a state has discriminated against a foreign corporation engaged in interstate commerce merely because it has failed to do business in that state.

In a footnote the court in *Coons* indicates that even if it applied a balancing test, it would still find that the provisions of *N.J.S.A.* 2A:14-22 violate the Commerce Clause. According to the court, the burdens attached to the requirement of obtaining certification to register to do business to avoid the tolling of the statute of limitations outweigh the benefits arising from the tolling provision.

The other court which has recently ruled upon this issue is the United States District Court for the District of Idaho in *Richard Dean McKinley v. Combustion Engineering, Inc., et al.*, Civil No. 80-4045, filed November 15, 1983. In *McKinley* the court had dismissed the plaintiff's wrongful death claims on the grounds they were barred by the statute of limitations. The dismissal was appealed to the Ninth Circuit. The Ninth Circuit, because of the Supreme Court's decision in *G. D. Searle & Co. v. Cohn, supra,* remanded the case to the district court for a decision on whether a former provision of Idaho Code 30-509 violated the Commerce Clause. The provisions of Idaho Code 30-509 were as follows:

> *Statute of limitations.*—Every such corporation which fails to comply with the provisions of this chapter shall be denied the benefit of the statutes of the state limiting the time for the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporations during such time as such person duly designated, as foresaid, upon whom such service can be made, shall be within the state.

Subsequent to the filing of the lawsuit, this statute was repealed.

The court in *McKinley* first discussed the court's decision in *Coons*. The court in *McKinley* then examined Idaho law in order to determine the burden which the Idaho tolling statute placed upon foreign corporations. The court found that the tolling statute forced foreign corporations in Idaho to choose between either exposing itself to personal jurisdiction in the Idaho courts by complying with the tolling statute or being liable in perpetuity for all lawsuits filed against it under Idaho state law. The court in *McKinley* agreed with the court in *Coons* that if a *per se* rule was employed the burden imposed by the tolling statutes on foreign corporations would violate the Commerce Clause. According to the court in *McKinley*, however, a *per se* rule was inapplicable because under existing Idaho case law the tolling statute could not be found to apply to firms engaged exclusively in interstate commerce.

The court in *McKinley* therefore utilized a balancing test and analyzed whether the burdens on interstate commerce imposed by the Idaho tolling statute outweigh the benefits of the statute. The court rejected the argument that no real burden was imposed upon a foreign corporation by forcing it to register in order to avoid forever being liable on state causes of action because a foreign corporation was already subject to personal jurisdiction under the Idaho long arm statute. According to the court in *McKinley*, the law on minimum contacts is not crystal clear. The standards which the courts have utilized in determining whether personal jurisdiction exists raise questions regarding "what constitutes substantial activities," "when will a single act be sufficient" and "what is reasonable." Therefore, foreign corporations doing business in Idaho may have an arguable defense based upon lack of personal jurisdiction. The provisions of Idaho Code 30-509 require a corporation to waive this defense and therefore impose a real burden upon foreign corporations which seek to avoid perpetual liability in Idaho.

The court in *McKinley* found that the benefit of requiring foreign corporations to appoint in-state representatives for service of process purposes is to make it easier for Idaho residents to effect service on a foreign corporation, resulting in a time and cost savings. According to the court in *McKinley*, this benefit, however, is outweighed by the burden of waiving a legal defense. A successful motion to dismiss for lack of personal jurisdiction can end possibly protracted litigation.

In addition, the court found that the benefits of the Idaho tolling statute could have been obtained through less onerous means. Corporations could have been required to file with the Secretary of State the location and address of its representative for service of process purposes.

The *McKinley* court therefore found:

> . . . that a statutory scheme that in essence requires foreign corporations to waive a legal defense places a serious burden on interstate commerce. These statutes do provide benefits to Idaho residents, but the

same benefits could be realized through less onerous means. But even if less onerous means were not available, the Court would still find, for the reasons previously discussed, that the burdens placed on interstate commerce by the Idaho tolling statutes are clearly excessive when compared to the benefits obtained by those statutes.

For all of the above reasons, the Court finds that Idaho Code 30-509 was unconstitutional under the Commerce Clause during the time that it was in effect prior to its repeal in 1979.

Richard Dean McKinley v. Combustion Engineering, Inc., *supra* at 13-14.

This Court agrees with the analysis of the *Coons* court and the court in *McKinley*. Regardless of whether the provisions of O.R.C. § 2305.15 are analyzed under a *per se* test or a balancing test, this provision, as applied to defendant Heil-Quaker, violates the Commerce Clause. Under the *per se* test this provision violates the Commerce Clause by forcing interstate corporations to obtain a license in order to obtain the benefit of the statute of limitations defense. Under the balancing test, the burden of having to obtain a license and therefore waiving a possible defense of lack of personal jurisdiction outweighs the benefits to potential litigants of making service of process easier to obtain on corporations engaged solely in interstate commerce. The Court therefore finds that the provisions of O.R.C. § 2305.15 are unconstitutional, as applied to defendant Heil-Quaker, because they violate the Commerce Clause.

Plaintiffs have sought to distinguish the court's decision in *Coons* from the case sub judice on the grounds that New Jersey's statutory scheme is dissimilar to Ohio's.

Plaintiffs have argued that Ohio's statutory scheme, unlike that of New Jersey, permits Ohio's Secretary of State to accept the appointment of a statutory agent for filing under the provisions of O.R.C. § 111.6. This section provides in pertinent part as follows:

> The Secretary of State shall charge and collect, for the benefit of the state, the following fees:
>
> * * *
>
> (H) For filing any certificate or paper not required to be recorded, the sum of five dollars.

In support of this argument, plaintiffs have attached a letter written by Corporations Counsel for the Secretary of State of Ohio. This letter indicates in part:

> If, after thorough investigation into whether the foreign unlicensed corporation was doing business in Ohio, it is found that the corporation is truly interstate in nature, this office could accept the proposed designation of agent without requiring the foreign corporation to obtain a license.

The court in *Coons* was presented with a similar argument. While the Secretary of State had offered his opinion that no statutory procedure existed for a corporation engaged in interstate commerce to designate an agent without registering to do business in New Jersey, the Attorney General had given his opinion that *N.J.S.A.* 14A:1-6(4) constituted such a provision. The provisions of *N.J.S.A.* 14A:1-6(4) provide in relevant parts as follows:

> The Secretary of State shall record all documents, excepting annual reports, which relate to or in any way affect corporations, and which are required or permitted by law to be filed in his office.

The court held that foreign corporations would not be able to file notice with the Secretary under *N.J.S.A.* 14A:1-6(4) because "that statute directs the Secretary to record documents that are filed as required or permitted by law. It does not independently authorize the filing of any documents." *Coons, supra,* at 12-13.

Plaintiffs in the present action assert that Ohio's statutory scheme differs significantly from New Jersey's because Ohio's Secretary of State may accept an appointment of a statutory agent for filing pursuant to O.R.C. § 111.16.

The Court finds no merit to plaintiffs' argument. The Court agrees with the New Jersey Court that the mere fact that the Secretary of State can accept a document for filing does not independently authorize the filing of such a document. Any scheme which would permit a corporation engaged solely in interstate commerce to designate an agent for service of process purposes should be enacted by the legislature. Therefore, the Court finds the opinion which plaintiffs obtained from Patricia Mell, Corporations Counsel for the Secretary of State, dated December 22, 1983, to be unpersuasive. As defendant Heil-Quaker points out, under existing Ohio law it is not practicable or realistic to speculate that a corporation engaged in interstate commerce might surmise that the Secretary of State after thorough investigation might accept the designation of an agent from a corporation which has not registered to do business in Ohio.

In addition, the Court notes that the Secretary of State's opinion on the issue of whether a corporation engaged in interstate commerce can appoint an agent has

changed during the course of this litigation. Defendant Heil-Quaker filed its letter also from Patricia Mell, dated September 14, 1983, in which Ms. Mell indicated as follows:

> Pursuant to Section 1703.041 O.R.C., the Ohio Secretary of State may accept for filing a designation of statutory agent only for those foreign corporations which are duly licensed to transact business within the State. A designation of agent filed by a foreign corporation which is not licensed in Ohio would necessarily be rejected by this office due to the provisions of Section 1703.191 O.R.C.

In light of the Court's finding that the provisions of O.R.C. § 2505.10 violate the Commerce Clause, the Court does not reach defendant Heil-Quaker's due process argument. The Court will grant Heil-Quaker's motion to dismiss.

There is also pending in this matter defendant Sears' motion for summary judgment, plaintiffs' opposition thereto, defendant Sears' reply and plaintiffs' response.

Defendant Sears has moved for summary judgment on the grounds that plaintiffs' claims against it are barred by the statute of limitations. According to defendant Sears, plaintiffs failed to bring their claims for bodily injury within the two year statute of limitations set forth in O.R.C. § 2305.11. Defendant Sears successfully made this same argument in C 83-682 in the District Court in Minnesota. That court dismissed plaintiff's claims against defendant Sears on the grounds that those claims were barred by the applicable provision of the Minnesota statute of limitations.

The Court finds that no genuine issues of fact exist and defendant Sears is entitled to summary judgment as a matter of law on the grounds that plaintiffs' claims against it are barred by the statute of limitations. The applicable statute of limitations is set forth in O.R.C. § 2305.10 which provides in pertinent part as follows:

> An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

Plaintiffs are clearly seeking to bring an action for bodily injury and not breach of contract. See *Andrianos v. Community Traction Co.*, 155 Ohio St. 47, 97 N.E.2d 49 (1951). The Court rejects plaintiffs' argument that the applicable statute of limitations is set forth in O.R.C. § 2305.07. Even if plaintiffs' arguments regarding the alleged disabilities of plaintiffs Dale and William Copley are accepted as true, plaintiffs failed to initiate their action within the two year period set forth in O.R.C. § 2305.07.

The provisions of the Consumer Product Safety Commission Act, 15 U.S.C. § 2072 et seq., do not establish plaintiffs' right to bring this action. Therefore, the Supreme Court's decision in *Bora v. Kerchelich*, 2 Ohio St.3d 146, 443 N.E. 2d 509 (1983), is inapplicable in the case sub judice.

In addition, as defendant Sears points out, it had no knowledge of the alleged defective nature of the valve manufactured by defendant Honeywell until after plaintiffs filed this action. Therefore, defendant Sears had no duty towards plaintiffs under the provisions of the CPSCA. The Court will grant defendant Sears' motion for summary judgment.

Finally, there is pending in this action defendant Honeywell's motion for summary judgment, plaintiffs' opposition thereto, defendant Honeywell's reply, and plaintiffs' response. Defendant Honeywell has also moved for summary judgment on the grounds that plaintiffs' claims against it are barred by the statute of limitations. Plaintiffs have alleged a private cause of action against defendant Honeywell under Section 23 of the Consumer Product Safety Act, 15 U.S.C. § 2072. Plaintiffs, in the action they originally filed in Minnesota, alleged negligence, breach of express and implied warranties, and fraudulent concealment against defendant Honeywell. The court in Minnesota originally granted a motion for judgment on the pleadings filed by defendant Honeywell on the grounds that plaintiffs' claims against defendant Honeywell were barred by the statute of limitations. Plaintiffs then filed a motion for reconsideration in which they argued that the statute of limitations had been tolled by defendant Honeywell's fraudulent concealment of certain relevant facts. The District Court in Minnesota vacated its dismissal of plaintiffs' action against defendant Honeywell on the grounds that plaintiffs' case against defendant Honeywell should not be dismissed at the pleading stage and plaintiffs should be given an opportunity to develop it further. Defendant Honeywell then argued that plaintiffs' action should be dismissed on the grounds that plaintiffs, by filing two actions, had split their claims between this Court and the District Court in Minnesota. The District Court in Minnesota denied defendant Honeywell's motion to dis-

miss and ordered the case transferred to this Court pursuant to the provisions of 28 U.S.C. § 1404(a).

For the reasons previously stated in reference to defendant Sears' motion, the Court finds merit to defendant Honeywell's argument that the statute of limitations governing plaintiffs' claims is set forth in O.R.C. § 2305.10 and that any tolling provisions set forth in O.R.C. § 2305.16 are inapplicable in the case sub judice.

The Court, however, agrees with the Minnesota Court that it would be inappropriate at this stage of the proceedings to grant defendant Honeywell's motion for summary judgment because genuine issues of fact exist on the issue of whether defendant Honeywell fraudulently concealed from plaintiffs its alleged wrongful conduct.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that Case No. C 83-682 and the above captioned case be, and hereby are, consolidated; and it is

FURTHER ORDERED that defendant Heil-Quaker's motion for summary judgment be, and hereby is, GRANTED: and it is

FURTHER ORDERED that defendant Sears, Roebuck & Company's motion for summary judgment be, and hereby is, GRANTED; and it is

FURTHER ORDERED that defendant Honeywell, Inc.'s motion for judgment on the pleadings or, in the alternative, summary judgment be, and hereby is, DENIED; and it is

FURTHER ORDERED that this cause be, and hereby is, set for pretrial on March 19, 1984 at 11:00 A.M.

/s/ John W. Potter
United States District Judge

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1. The argument that the provisions of O.R.C. § 2305.15 violate the Due Process Clause and the Commerce Clause of the United States Constitution were not considered by the Ohio Supreme Court in *Seeley*.

EXHIBIT A

Secretary of State
(SEAL) Sherrod Brown

December 22, 1983

Murray & Murray Co., L.P.A.
Attn: James T. Murray
Murray Building
300 Central Avenue
Sandusky, Ohio 44870

Dear Mr. Murray:

This letter is written in response to your inquiry concerning my September 14, 1983 correspondence with Mr. Stanley Lipnick, Esq. of Chicago.

My letter to Mr. Lipnick merely stated a conclusion based on facts not presented in the letter. I hope this response will remedy any existing ambiguities by discussing the facts and issue you now present.

The question raised was whether the Secretary of State automatically, and in the ordinary course of business, accepts a designation of agent from a foreign unlicensed corporation. As I indicated in my letter to Mr. Lipnick, the answer to this question is in the negative. However, if a thorough investigation of the foreign unlicensed corporation determined that the corporation was strictly interstate in nature, there is nothing in the Ohio corporations laws which either prohibits such a filing or requires this office to accept it.

It is a long standing position that the states have a general privilege to exclude foreign corporations or to admit them upon certain terms and conditions. These conditions are certainly limited by both the state and federal constitutions and, as the power to regulate interstate commerce is conferred by the United States Constitution, no state can absolutely exclude a corporation engaged in interstate commerce. The state can however, impose conditions upon the foreign corporation's admission to the state.

14th Floor State Office Tower Columbus, Ohio 43216
614/466-2530

Before a foreign corporation can establish a presence in Ohio, it must apply for a license and concurrently designate an agent. The designation of an agent without a license would, on its face, be an attempt by the corporation to acquire a presence in Ohio without the attendant formality of licensure. Ohio corporations laws do not require the office to accept such a filing. Even so, the legislature did give the Secretary of State discretion to accept for filing pertinent documents not required by law to be filed. The Secretary of State would not merely accept a designation of agent presented under circumstances such as these since the facts presented support the presumption that the foreign corporation is engaged in business in Ohio without the benefit of a license and is attempting to circumvent the law by filing a designation of agent.

If, after thorough investigation into whether the foreign unlicensed corporation was doing business in Ohio, it is found that the corporation is truly interstate in nature, this office could accept the proposed designation of agent without requiring the foreign corporation to obtain a license.

I hope that this discussion has put the matter in its proper prespective.

Very truly yours,

/s/ Patricia Mell
Patricia Mell
Corporations Counsel

PM/ral

Secretary of State
(SEAL) Sherrod Brown

September 14, 1983

Stanley M. Lipnick, Esq.
Arnstein, Gluck & Lehr
75th Floor, Sears Tower
Chicago, Illinois 60606

Dear Mr. Lipnick:

Pursuant to Section 1703.041 O.R.C., the Ohio Secretary of State may accept for filing a designation of statutory agent only for those foreign corporations which are duly licensed to transact business within the State. A designation of agent filed by a foreign corporation which is not licensed in Ohio would necessarily be rejected by this office due to the provisions of Section 1703.191 O.R.C.

Very truly yours,

/s/ Patricia Mell
Patricia Mell
Corporations Counsel

PM/ral

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